BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON K. ANDERSON	)	
Claimant	)	
	)	
VS.	)	
	)	
VICTORY JUNCTION RESTAURANT	)	
Respondent	)	Docket No. 1,015,122
	)	
AND	)	
	)	
KS. RESTAURANT & HOSPITALITY	)	
SELF-INSURERS FUND	)	
Insurance Carrier	)	

ORDER ON REMAND

Following the issuance of an Order from this Board, claimant appealed her claim to the Court of Appeals. On October 27, 2006, the Court of Appeals issued its opinion, reversing the Board's decision and remanding the matter to the Board "for further proceedings on the issue of Anderson's post-injury wages."[1]

In the original Order, a majority of this Board concluded that claimant sustained a post-injury wage loss while working 4 hours per day.[2] Because there was a wage loss in excess of 10 percent, the Board went on to consider the relative good faith of the parties, consistent with the principles set forth in *Foulk*[3] and *Copeland*[4] and concluded claimant demonstrated a lack of good faith by choosing to work as a waitress for respondent 4 hours per day. The majority of the Board believed that the claimant could "with some effort, find

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[1] *Anderson v. Victory Junction Restaurant,* No. 95,871, Unpublished opinion filed Oct. 27, 2006 at 9.

[2] Although claimant first testified she was earning a comparable post-injury wage, there was subsequent testimony from claimant that she had erroneously calculated her post-injury wages. And that in fact, she had sustained a 14 percent wage loss. Had the Board determined claimant had *not* sustained a wage loss in excess of 10 percent, there would have been no reason to explore her good faith or her task loss for purposes of the permanent partial general (work) disability analysis required by K.S.A. 44-510e(a) as she would be limited to her functional impairment.

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

appropriate full time employment that would pay her at least $6.00 per hour."[5] The majority concluded, based upon the evidence contained within the record, that claimant had voluntarily decided to work 4 hours per day, and that while that decision might well have been justified with respect to waitressing, the Board believed that had she looked into more sedentary positions, she could work full-time and earn as much as $6.00, a sum just over the federal minimum wage. In essence, it was the Board's view that claimant was purposefully underemployed thereby creating a wage loss, something prohibited by the principles encompassed by *Foulk* and *Copeland.* Thus, the Board found it was legally appropriate to impute a wage to claimant for purposes of calculating the work disability.

The Court of Appeals has concluded that the Board lacked substantial evidence to support its finding of fact that claimant had the capacity to earn $6.00 per hour. The Court of Appeals then went on to correctly acknowledge that "[i]n the 15 years before Anderson's injury, she worked as either a waitress, a bartender, or a grocery clerk."[6] And because there was "no evidence that she could obtain alternate full-time employment that paid $6 per hour"[7] the Court of Appeals believed it was speculation on the Board's part to use that wage for purposes of calculating the wage loss component of claimant's alleged work disability.

Accordingly, the Court of Appeals reversed the Board's finding with respect to wage loss and directed the Board to revisit the issue. The Board has done so and concludes, based upon the Court of Appeal's findings with respect to claimant's good faith and her capacity to earn a wage, that claimant sustained a 14 percent wage loss following her injury.

In coming to this conclusion, the Board has considered claimant's own records which she produced during her deposition which substantiate a 14 percent actual wage loss (based upon $227.08 per week working 20 hours per week), at least in 2004, although at the regular hearing she testified that her wages were higher than the $227.08 figure. Like the Court of Appeals, the majority notes that claimant has no transferrable skills and has never performed any sedentary or office work. While the Board would normally impute the federal minimum wage of $5.15 per hour in those instances where the parties offer no more explicit testimony as to a claimant's capacity to earn, in this instance, the $5.15 per hour over a 40 hour work week translates to $206 per week, a sum less than claimant's actual wages based upon her deposition. Thus, the Board finds the wages claimant is actually earning in her present part-time position is a more accurate indicator of her true capacity. Based upon the directions from the Court and the record as a whole, the Board finds that claimant sustained a 14 percent wage loss as a result of her injury.

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[5] Board Order (Dec. 20, 2006) at 6.

[6] Court of Appeals opinion at 7.

[7] *Id.*

When the 14 percent wage loss is averaged with the 100 percent task loss found in the Board's original Order, the result is a 57 percent work disability. Accordingly, the ALJ's Award is hereby modified (as is the Board's Order) to reflect a 57 percent permanent partial general (work) disability.

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 8, 2006 and the Board Order dated December 20, 2005 are modified as follows:

The claimant is entitled to 18.32 weeks of temporary total disability compensation at the rate of $151.39 per week or $2,773.46 followed by 23.43 weeks of permanent partial disability compensation at the rate of $151.39 per week or $3,547.07 for a 7 percent functional disability followed by 211.23 weeks of permanent partial disability compensation at the rate of $151.39 per week or $31,978.11 for a 57 percent work disability, making a total award of $38,298.64.

As of February 14, 2007 there would be due and owing to the claimant 18.32 weeks of temporary total disability compensation at the rate of $151.39 per week in the sum of $2,773.46 plus 150.82 weeks of permanent partial disability compensation at the rate of $151.39 per week in the sum of $22,832.64 for a total due and owing of $25,606.10, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $12,692.54 shall be paid at the rate of $151.39 per week for 83.84 weeks or until further order of the Director.

All other findings and conclusions are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of February, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENTING OPINION

The undersigned Board members respectfully dissent from the majority's decision and would again impute a $6.00 post-injury wage to claimant. This finding is made with full knowledge of the facts of this case, including the fact that claimant *voluntarily* reduced her number of work hours. It is clear from the record that claimant was not *medically* limited by her condition to working on a part-time basis. Rather, she elected to reduce her work hours, working her regular duties. And when the physicians learned of her self-limitation, they conceded to her wishes. Consequently, claimant sustained self created a wage loss.

The Court of Appeals' decision and the majority's resulting decision flies in the face of the considerations expressed in *Foulk* and *Copeland*, and a number of cases that followed, where the overriding principle is to encourage injured claimants to seek out appropriate post-injury employment, maximizing their capacity to earn, through application of the good faith doctrine. Moreover, the Court of Appeals' determination seems inconsistent with the recently issued *Graham*[8] decision.

In *Graham*, the claimant's work disability award was reversed and he was awarded only a functional impairment because the Court of Appeals concluded that no physician had directed claimant to work a reduced number of hours.[9] And although that claimant had attempted, for a significant period of time, the accommodated job and was unable to do so without pain, he was nevertheless limited to a functional impairment and not entitled to work disability benefits because no physician opined that he should limit his hours. It is difficult to ascertain the consistency between the instant set of facts and those present in *Graham*, yet the outcome is wholly inconsistent.

The Court of Appeals' review is limited in accordance with the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions.[10] As the Kansas Supreme Court has recently said "[t]he Court of Appeals . . . do[es] not have the same power as the ALJ and Board to make findings of fact; rather, appellate review for questions of fact is limited to determining whether the Board's findings of fact are support by substantial competent evidence."[11] Yet, it would seem the Court of Appeals has substituted its judgment for the Board's with respect to claimant's good faith, or as they term it "bad faith", and claimant's capacity to earn.

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[8] *Graham v. Dokter Trucking Group*, 36 Kan. App. 2d 521, 141 P.3d 1192, *rev. granted* (2006).

[9] *Id*.

[10] K.S.A. 77-601, et seq., K.S.A. 2005 Supp. 44-556; see also *Griffin v. Dale Willey Pontiac-Cadillac-GMC Truck, Inc.*, 268 Kan. 33, 34, 991 P.2d 406 (1999).

[11] *Sumner v. Meier's Ready Mix, Inc.*, __ Kan. ___, 144 P.3d 668, ___ (2006)(citation omitted).

The Board, in its original Order, imputed a $6.00 an hour full-time wage to claimant. The Board frequently uses its expertise in these matters to determine an appropriate post-injury wage based upon the entire record. And while it is true that claimant's vocational expert did not expressly testify that claimant had such a capacity, the fact remains that claimant is not looking for appropriate, *full-time* post-injury employment. Her present *part-time* wages of $224.08 per week reflect an hourly rate of $11.35. While claimant's educational background and her vocational skills may be limited, that was taken in account when the $6.00 figure was used. The Board recommended a more sedentary job, rather than the job she presently performs, believing that she could work on a full-time basis if the job duties were less strenuous. And the $6.00 per hour reflected an entry level position in such a context. But based upon the Court of Appeals' findings of fact, claimant's decision to voluntarily limit her wages is an appropriate basis for a work disability.

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BOARD MEMBER

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BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge